

A **BANK KERJASAMA RAKYAT BHD & ORS**

v.

HJ MAT HJ AHMAD

B HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-1183-2002]
13 FEBRUARY 2007

C **CIVIL PROCEDURE:** *Summary judgment - Principles applicable - Whether plaintiffs could apply to have their case heard under O. 14A Rules of the High Court 1980 notwithstanding dismissal of a previous application under O. 14 Rules of the High Court 1980 - Scope of enquiry of both sections - Issues to be examined and adjudicated upon - Whether a fit and proper case to be disposed of under O. 14A Rules of the High Court 1980*

This was an application by the plaintiffs to have this case heard under O. 14A Rules of the High Court 1980 ('RHC') on the ground that their claim for the repayment of money arising out of a settlement agreement entered into between the defendant and them could be properly disposed of in a summary manner under O. 14A RHC. The plaintiffs' claim arose from a judgment obtained by the plaintiffs in the High Court against the defendant for the sum owed to them. The defendant did not pay the judgment sum; in consequence thereof, a settlement agreement was entered into between the parties as evidenced by several exchanges of letters. Thereafter, the defendant paid RM2.1 million to the plaintiff, leaving an unpaid balance of RM1.7 million. The plaintiffs, in claiming the balance sum, had previously applied to enter final judgment under O. 14 RHC which application had been dismissed by the Senior Assistant Registrar and confirmed by the judge in chambers. The defendant objected to the present application. It fell to this court to decide whether the plaintiffs, despite being unsuccessful in their earlier O. 14 application, could still succeed in this application under O. 14A RHC.

Held (allowing the application):

I (1) This was a fit and proper case to be disposed of under O. 14A RHC notwithstanding that the plaintiffs had applied for and failed to obtain a summary judgment under O. 14 RHC. An application for summary judgment under O. 14 RHC

is different in nature from an application under O. 14A RHC. Whereas under O. 14 RHC, the scope of the enquiry is restricted to discovering whether there is a triable issue on the plaintiffs' case, under O. 14A RHC, the scope of enquiry includes an examination of the affidavit evidence to discover whether the plaintiffs' claim ought to be granted in those cases where the court can justifiably dispense with oral evidence to arrive at a finding and a decision. Having heard the submissions of the parties and examined the pleadings filed by the parties in this case, it was clear that the only issues that needed to be examined and adjudicated upon were as follows: (i) whether the series of letters between the plaintiffs and the defendant could lead to a concluded contract by which the defendant would be liable to pay the plaintiffs; and (ii) whether the plaintiffs' claim would be barred by s. 6 Limitation Act 1953, the claim being a claim in contract. Therefore, an order in terms of this application was granted, and the parties were ordered to prepare the following documents for the purpose of the proceedings under O. 14A: (a) a Statement of Agreed Facts based entirely on the pleadings; (b) a Statement of the two issues to be tried; (c) all affidavits deemed necessary to support or to oppose the filing of the claim; and (d) all the above to be filed in within one month from the day of this judgment. (paras 6, 7, 8, 9 & 10)

Case(s) referred to:

BOC Group plc v. Centeon LLC & Anor [1999] 63 Con LR 104 (*refd*)
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337
CA (refd)
Korso Finance Establishment Anstalt v. John Wedge (Transcript No. 14/387)
(Unreported) (refd)

Legislation referred to:

Limitation Act 1953, s. 6
 Rules of the High Court 1980, O. 14A

For the plaintiffs - KK Chan; M/s Shook Lin & Bok
For the defendant - MY Phan; M/s Wilson Wong & Tan

Reported by Suresh Nathan

A JUDGMENT

Kang Hwee Gee J:

This is my oral judgment: (ex-tempore)

B [1] This is an application by the plaintiffs to have this case heard under O. 14A of the Rules of the High Court 1980 on the grounds that:

- C 1. The plaintiffs' claim for the repayment of money arising out of a settlement agreement entered into between the defendant and the plaintiffs can be properly disposed of in a summary manner under O. 14A.
- D 2. The plaintiffs' claim arose from a judgment obtained by the plaintiffs in the High Court D1-23-336-88 which judgment order read as follows:

IN THE HIGH COURT OF MALAYA AT
KUALA LUMPUR
(COMMERCIAL DIVISION)

E SUIT NO. D1-23-336-88

Between

- F 1. Bank Kerjasama Rakyat Malaysia Berhad
2. Malayan Banking Berhad
3. The Malayan Finance Corporation Berhad
4. Kwong Yik Bank Berhad
5. United Malayan Banking Corporation Berhad
- G 6. Rakyat First Merchant Bankers Berhad ... Plaintiffs

And

- H 1. Pembinaan Bandar Melaka Sdn. Bhd.
2. Haji Mat @ Mat Shah Bin Ahmad @ Sapuan
3. Haji Abd. Mutalib Bin Datuk Seri Datuk Abdul Razak
4. Datuk Johari Bin Yusof
5. Haji Anuarul Aini Bin Mohd. Perai ... Defendants

I Dated the 28th day of September, 1988

JUDGMENT

The 2nd, 3rd, 4th & 5th Defendants having entered appearance herein and the Court having under Order 14 ordered that Judgment as hereinafter provided be entered for the Plaintiffs against the 2nd, 3rd, 4th & 5th Defendants and each of them.

IT IS THIS DAY ADJUDGED that:

1. the 1st Plaintiff do recover against the 2nd, 3rd and 4th Defendants and each of them:

- (a) the sum of \$3,681,039.76 (Ringgit Three Million Six Hundred & Eighty One Thousand Thirty Nine and Sen Seventy Six only) under paragraph 9(a) of the Amended Statement of Claim;

- (b) interest on the sum of \$2,825,600.00 (Ringgit Two Million Eight Hundred & Twenty five Thousand and Six Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;

2. the 2nd Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:

- (a) the sum of \$2,760,013.16 (Ringgit Two Million Seven Hundred and Sixty Thousand Thirteen and Sen Sixteen only) under paragraph 9(b) of the Amended Statement of Claim;

- (b) interest on the sum of \$2,119,200.00 (Ringgit Two Million One Hundred & Nineteen Thousand and Two Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;

3. the 3rd Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:

- (a) the sum of \$2,775,404.18 (Ringgit Two Million Seven Hundred and Seventy Five Thousand Four Hundred and Four and Sen Eighteen only) under paragraph 9(c) of the Amended Statement of Claim;

- (b) interest on the sum of \$2,119,200.00 (Ringgit Two Million One Hundred and Nineteen Thousand and Two Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realization;

- A 4. the 4th Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:
- (a) the sum of \$1,840,008.79 (Ringgit One Million Eight Hundred and Forty Thousand and Eight and Sen Seventy Nine only) under paragraph 9(d) of the Amended Statement of Claim;
- B
- (b) interest on the sum of \$1,412,800.00 (Ringgit One Million Four Hundred and Twelve Thousand and Eight Hundred only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realization;
- C
5. the 5th Plaintiff do recover against the 2nd, 3rd, 4th & 5th Defendants and each of them:
- (a) the sum of \$1,840,008.76 (Ringgit One Million Eight Hundred and Forty Thousand and Eight and Sen Seventy Six only) under paragraph 9(e) of the Amended Statement of Claim;
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- (b) interest on the sum of \$1,412,799.99 (Ringgit One Million four Hundred and Twelve Thousand Seven Hundred and Ninety Nine and Sen Ninety Nine only) at the rate of 13.5% per annum and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;
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- F 6. the 6th Plaintiff do recover against the 2nd, 3rd and 4th Defendants and each of them:
- (a) the sum of \$878,688.41 (Ringgit Eight Hundred and Seventy Eight Thousand Six Hundred and Eighty Eight and Sen Forty One Only) under paragraph 9(f) of the Amended Statement of Claim;
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- (b) interest on the sum of \$706,400.00 (Ringgit Seven Hundred and Six Thousand and Four Hundred only) at the rate of 2.5% per annum above the 6th Plaintiff's 3 months cost of funds and a penalty charge of 2% per annum with effect from 20th August, 1987 to the date of full payment or realisation;
- H
- (c) the sum of \$40,000.00 (Ringgit Forty Thousand only) under paragraph 12 of the Amended Statement of Claim with interest thereon at the rate of 8% per annum from 8th February, 1988 to the date of full payment or realisation.
- I

AND IT IS ALSO ADJUDGED that the 2nd, 3rd, 4th and 5th Defendants and each of them do pay to the Plaintiffs the costs of this application to be taxed by a proper officer of the Court.

A

Dated the 28th day of September, 1988.

Sgd.

B

Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Order is filed by Messrs. Shook Lin & Bok, Solicitors for the Plaintiffs herein and whose address for service is 21st Floor, Wisma HLA, Jalan Raja Chulan, 50200 Kuala Lumpur.

C

JM/10771-5/RFMB/PBM

3. The defendant did not pay the judgment sum. In consequence thereof, a settlement agreement was entered into between the parties as evidenced by several exchanges of letters as follows in chronological orders (exh. "AZA11" encl. 24)

D

- i. Letter dated 15 December 1995
- ii. Letter dated 16 December 1995
- iii. Letter dated 20 December 1995
- iv. Letter dated 26 December 1995
- v. Letter dated 16 January 1996
- vi. Letter dated 19 January 1996
- vii. Letter dated 27 January 1996
- viii. Letter dated 13 February 1996
- ix. Letter dated 28 February 1996
- x. Letter dated 14 March 1996
- xi. Letter dated 15 March 1996
- xii. Letter dated 12 April 1996
- xiii. Letter dated 4 June 1996
- xiv. Letter dated 7 June 1996
- xv. Letter dated 11 December 1997
- xvi. Letter dated 2 January 1998

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- A xvii. Letter dated 5 January 1998
xviii. Letter dated 15 January 1998
xix. Letter dated 14 May 1998
- B xx. Letter dated 8 December 1999.
4. The agreement that had been reached between the parties is in p. 296 encl. 24 exh. "AKZA11" as confirmed by the defendant in para. 2 of its letter dated 15 March 1996.
- C 5. Thereafter the defendant paid RM2.1 million to the plaintiff leaving a balance of RM1.7 million unpaid.
6. The plaintiff is claiming the balance sum.
- D [3] The application is opposed by the defendant on the following grounds:
- E 1. The plaintiffs had previously applied to enter final judgment under O. 14 of the Rules of the High Court and the application had been dismissed by the senior assistant registrar and confirmed by the judge in chambers Abdul Wahab bin Said Ahmad J.
- F 2. The plaintiffs' application had been dismissed obviously because they are triable issues and not a suitable case to grant summary judgment. It follows therefore that the present application being another application for summary judgment would also contain triable issues.
- G 3. That there may be triable issues had already been decided by Abdul Wahab bin Said Ahmad J.
4. The defendant has also failed to strike out the plaintiffs' claim thereby confirming that there are triable issues.
5. Abuse of process – having failed to obtain O. 14.
- H 6. This case is more suitable to be dealt with at a full hearing where witnesses may have to be called.
7. Under the statement of claim the plaintiffs are only claiming the balance sum of RM1.7 million as an alternative trade.
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[4] Reply by Encik Chan, counsel for the applicant:

A

1. There is no authority to support the view that just because a party had failed in an O. 14 application that he should not be allowed to apply under O. 14A but there are cases in the English jurisdiction where a party had unsuccessfully proceeded under O. 14 and subsequently applied under O. 14A. See *BOC Group plc v. Centeon LLC and Another* [1999] 63 Con LR 104 per Lord Justice Evans at p. 3 of 11 Lexis Nexis:

B

The appeal is from Rix J in the Commercial Court (see p 104, ante). He held that cl 2.7 does not have that effect. He therefore refused the application for summary judgment under RSC Ord 14, and answered the question of construction in favour of the defendant, the purchaser, under Ord 14A. The sellers appeal. They are the BOC Group plc (BOC).

C

D

Submits: This case illustrates that having dismissed the plaintiff's case under O. 14 the learned English justice Rix went on to decide the case under O. 14A. The Court of Appeal upheld the procedure that he adopted.

E

Submits: An O. 14 is different from an O. 14A. Under O. 14 the court has to decide whether there is a triable issue that ought to go for trial whereas under O. 14A the court makes an actual determination on any question of law or construction of any documents and makes a decision as to whether the action should be allowed or be dismissed. See *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 where Mohd Noor Ahmad JCA adopts the procedure in the English case of *Korso Finance Establishment Anstalt v. John Wedge* (unreported, 15 February 1994 (CA) Transcript No. 14/387) as follows:

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(1) An issue is 'a disputed point of fact or law relied on by way of claim or defence'.

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(2) A question of construction is well capable of constituting an issue.

(3) If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

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- A (4) Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something, that might run up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/5).
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- C
- Submits: The present case is a suitable candidate for O. 14A as the matter in this particular case involves the construction of documents, the making of which are not in dispute.
- D
- Submits: The present case involves the determination of whether the settlement agreement as evidenced by a series of correspondence between the parties tantamount to a valid agreement binding on the parties. This is a question of construction to be assessed from the series of documents. The other point that the court will have to decide is purely a question of law whether the period of limitation has set in under s. 6 of the Limitation Act 1953 taking into consideration the respective dates to decide on the accrual and expiry of the course of action.
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[5] Reply by counsel for the defendant:

- G 1. *BOC Group* can be distinguished on the procedure adopted. It would appear from the judgment of the Court of Appeal that both parties were agreeable to proceed on the O. 14A procedure on the one issue that the court proceeded to hear and decide. Here the defendant objects to this application.

H **Findings And Decision**

[6] This is a fit and proper case to be disposed off under O. 14A notwithstanding that the plaintiffs had applied for and failed to obtain a summary judgment under O. 14.

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[7] I accept the submission of counsel for the plaintiffs that an application for summary judgment under O. 14 is different in nature from an application under O. 14A. Whereas under O. 14 the scope of the enquiry is restricted to discovering whether there is a triable issue on the plaintiffs' case, under O. 14A the scope of enquiry includes an examination of the affidavit evidence to discover whether the plaintiffs' claim ought to be granted in those cases where the court can justifiably dispense with oral evidence to arrive at a finding and decision.

[8] Having heard the submission of parties and examined the pleading filed by the parties in this case, it is clear that the only issues that need to be examined and adjudicated upon is as follows:

1. Whether the series of letters between the plaintiffs and the defendant can lead to a concluded contract by which the defendant would be liable to pay the plaintiffs.
2. Whether the plaintiffs' claim would be barred by the s. 6 of the Limitation Act 1953, the claim being a claim in contract.

[9] I would therefore grant an order in terms of this application and order that the parties prepare the following documents for the purpose of the proceeding under O. 14A:

- i) A statement of agreed facts based entirely on the pleadings;
- ii) A statement of the two issues to be tried;
- iii) All affidavits deemed necessary to support or to oppose the claim be filed.
- iv) All the above to be filed in within one month from today.

[10] The application is to be heard on 10 April 2007.